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No. 75-1588

# In the Supreme Court of the United States

OCTOBER TERM, 1975

SAMUEL C. WATHEN, JR., PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
*Solicitor General,*

REX E. LEE,
*Assistant Attorney General,*

WILLIAM KANTER,
BARBARA L. HERWIG,
*Attorneys,*
*Department of Justice,*
*Washington, D.C. 20530.*

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### OPINION BELOW

The opinion of the Court of Claims (Pet. App. 57a-78a) is reported at 527 F.2d 1191.

### JURISDICTION

The judgment of the Court of Claims was entered on December 17, 1975, and a petition for rehearing was denied on January 30, 1976 (Pet. App. 79a-86a). The petition for a writ of certiorari was filed on April 29, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

### STATUTE AND REGULATIONS INVOLVED

The Veterans Preference Act of 1944 provides in pertinent part that (5 U.S.C. 7512(a)):

> An agency may take adverse action against a preference eligible employee, or debar him for future employment, only for such cause as will promote the efficiency of the service.

5 C.F.R. 735.209 provides that:

> An employee [of the Internal Revenue Service] shall not engage in criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, or other conduct prejudicial to the Government.

Section 1941.4(1) of the Rules of Conduct for Internal Revenue Service Employees (revised October, 1963) provides:

> The effectiveness of the Revenue Service in serving the public interest depends upon the extent to which the Service and its employees hold the confidence and esteem of the Nation's citizens. This means that each employee must do his part to maintain this confidence and esteem by performing his work conscientiously, courteously, and in the most effective manner possible; by conducting himself during and outside working hours in a manner which will bring credit upon the Service; and by observing the spirit, as well as the letter, of the laws and regulations, and Revenue Service and Treasury Department requirements governing employee conduct. Employees whose conduct does not conform to the rules may be removed from the Service or may be the subject of other disciplinary action.

## QUESTION PRESENTED

Whether the Court of Claims, in this case involving the discharge of a federal employee, applied the correct standard of review.



## STATEMENT

On May 9, 1965, petitioner, then an agent of the Internal Revenue Service entitled to veteran's preference, fatally shot a woman; he was arrested, charged with murder, and held in custody without bond pending trial (Pet. App. 58a). On May 14, 1965, petitioner was informed by the Internal Revenue Service that it proposed to remove him from the Service in not less than thirty days for violating Section 1941.4 of the Rules of Conduct for Internal Revenue Service Employees, by "conduct[ing] [himself] in a manner which brought discredit upon the Internal Revenue Service by fatally shooting Miss Winifred O. McLaughlin" (Pet. App. 59a, n. 3). Petitioner did not contest the proposal, and the removal became effective June 18, 1965 (Pet. App. 60a).

Subsequently, a state court found petitioner not guilty of homicide by reason of insanity, and committed him to a state mental hospital. On March 29, 1966, petitioner was released from custody upon a jury finding that he then was sane (Pet. App. 60a-61a).

Petitioner thereafter requested that he be reinstated to his former job with the Internal Revenue Service; the Service denied his request. Petitioner then appealed his removal and the denial of reinstatement to the Civil Service Commission. After considering the records of petitioner's criminal trial and sanity hearing and various newspaper reports concerning the fatal shooting, the Chief of the Appeals Examining Office of the Civil Service Commission sustained the removal and denial of reinstatement, reasoning that (Pet. App. 12a):

* * * The removal action against the appellant is based upon the fact that he did kill a human being and this act of killing violates standards of conduct required for retention on the rolls of the Internal Revenue Service.

* * * * *

As noted hereinbefore, there is no allegation in the record that the killing of this human being was done pursuant to authority of law or in self defense. In no sense then can it be a justifiable homicide as attorney for the appellant states. The situation requires no long discussion. The fact of the matter is that an Internal Revenue Agent has killed a human being, and has only escaped punishment by virtue of a plea of insanity. It is a simple conclusion of fact that the unjustified killing of a human being is inconsistent with the standards of conduct for employees in the Federal Service regardless of the state of their mind at the time the killing was committed. Therefore, we find the appellant's removal was for a cause which promotes the efficiency of the service. [Emphasis omitted.]

The Board of Appeals and Review affirmed (Pet. App. 62a).

Petitioner then commenced this action in the Court of Claims, alleging that his removal violated the Veterans Preference Act, 5 U.S.C. 7512(a), because it was not for a cause that "promote[d] the efficiency of the service," and seeking backpay and reinstatement. The Trial Judge ruled that petitioner's removal had been improper because petitioner's conduct had been found to be "wholly without fault" (Pet. App. 27a). The Court of Claims reversed (Pet. App. 57a-78a). The court determined that the



decision to remove petitioner was made in good faith and was not arbitrary, capricious, or unsupported by substantial evidence (Pet. App. 65a-70a). The court found that there was substantial evidence to support the findings that petitioner had committed the fatal shooting in a manner that brought discredit upon the Internal Revenue Service, within the meaning of the Rules of Conduct for Internal Revenue Service Employees and 5 C.F.R. 735.209, and that he derogated from the efficiency of the Service, within the meaning of the Veterans Preference Act (Pet. App. 65a-70a).

## ARGUMENT

Petitioner contends that the Court of Claims applied an improper and unduly restrictive standard of review to the administrative determinations upholding his removal. Petitioner relies primarily upon *Bowman Transportation* v. *Arkansas-Best Freight System*, 419 U.S. 281, and *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168, for the proposition that the reviewing court must at least discern a rational basis for such administrative determinations, and he asserts that the Court of Claims here failed to do so.

As indicated above, however, the Court of Claims carefully scrutinized the administrative record in determining that there was substantial evidence to support the findings that petitioner had committed the fatal shooting and thereby discredited the Internal Revenue Service. Although the court properly declined to substitute its judgment for that of the Internal Revenue Service in deciding whether a "faultless killing amounts to such cause for removal as will promote the efficiency of the service" (Pet. App. 65a), the court did examine whether there was a rational basis for such a decision (Pet. App. 68a-69a):

Plaintiff * * * asserts that public image considerations are not a sufficient basis for discharging an employee who is without fault. But * * * IRS was especially sensitive because of its need to maintain public confidence in its image of integrity, depending as it does essentially on voluntary compliance of the public. * * * It was the thrust of the testimony of plaintiff's supervisor that any scandal involving an IRS employee impaired the integrity of the office. * * *

* * * * *

Surely plaintiff's conduct, however legally faultless, could in the agency's discretion be found to have run afoul of these admonitions [in the Rules of Conduct for Internal Revenue Service Employees and in 5 C.F.R. 735.209] against bad public relations and notoriously disgraceful conduct prejudicial to the Government and falling short of the highest moral standards.

Accordingly, the standard of review employed by the Court of Claims here is consistent both with that employed by other lower federal courts that have reviewed such administrative determinations and with the holdings of this Court.[1]

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[1]Petitioner relies upon two decisions of the District of Columbia Circuit that require that agencies show a "reasonably foreseeable, specific connection" between the alleged conduct and the "efficiency of the service" with regard to discharges based upon allegations of homosexual behavior (*Norton* v. *Macy*, 417 F.2d 1161, 1167; *Scott* v. *Macy*, 349 F.2d 182, 185). Petitioner, however, has not cited any precedent for the proposition that an agency is required to make such a detailed showing when a discharge action is based upon the taking of human life, and we know of none. The unjustified fatal shooting of another human being reasonably can be presumed to cast grave doubt on the employee's reliability, trustworthiness, and ethical conduct, all of which affect the efficiency of the service. See *Embrey* v. *Hampton*, 470 F.2d 146 (C.A. 4); *Rodriguez* v. *Seamans*, 463 F.2d 837 (C.A.D.C.), certiorari dismissed, 409 U.S. 1094. See also *Polcover* v. *Secretary of Treasury*, 477 F.2d 1223, 1231-1232 (C.A.D.C.); *Finfer* v. *Caplin*, 344 F.2d 38, 41 (C.A. 2), certiorari denied, 382 U.S. 883; *Taffel* v. *Hampton*, 463 F.2d 251 (C.A. 5).

To the extent that, as petitioner claims (Pet. 19-20), there is any inconsistency among the decisions of the Court of Claims on this issue, the resolution of such an intra-court conflict is a matter appropriately left to that court.





## CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
*Solicitor General.*

REX E. LEE,
*Assistant Attorney General.*

WILLIAM KANTER,
BARBARA L. HERWIG,
*Attorneys.*

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